by competitive LECs.[78] Setting an interim rate structure allows a State more quickly "to open all markets, including the mid-size and small LECs, to local exchange competition."[79] Allowing an interim approach pending adoption of a more permanent rate structure also will enable a State commission to defer full-blown cost proceedings that otherwise "would be extremely time consuming and could delay competitive entry for several months."[80] In addition, permitting States to adopt interim rules will enable them to keep in place regulations that they have already adopted (provided, of course, that those regulations are consistent with the FCC rules promulgated in this proceeding).[81]

Once having allowed States to set interim solutions, the Commission's rules should provide for an orderly transition to more permanent structures. In particular, a State commission should be required to issue a final decision on a permanent rate structure prior to termination of any specified interim period. Absent such a requirement, allowing an interim

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78/ See Application of Electric Lightwave, Inc. for a Certificate of Authority To Provide Telecommunications Services in Oregon, CP 1, CP 14, CP 15, at 52 (Pub. Util Comm'n of Oregon, Adopted January 12, 1996) ("Oregon PUC Order") at 53; Illinois Bell Tel. Co.; Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, 94-0096 et seq., at 98 (Ill. Commerce Comm'n, adopted April 7, 1995) ("ICC Order") at 98.

79/ Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, R.95-04-043, I.95-04-044, Decision 95-07-54, at 38-9 (Calif. Pub. Util. Comm'n, adopted July 24, 1995) ("California PUC Interim Rules Order"), at 16; see Notice at ¶ 244 (use of interim rates "could permit new competitors to enter the market more quickly").

80/ Oregon PUC Order, at 53.

81/ See California PUC Interim Rules Order; Oregon PUC Order; Washington UTC Order at 29-30. See ICC Order (establishes interim rates of $0.0075 per minute for tandem switched termination and $0.005 per minute for end office switched termination); Application of City Signal, Inc. for an Order Establishing and Approving Interconnection Arrangements With Ameritech Michigan, Case No. U-10647, at 28 (Michigan Pub. Serv. Comm'n, adopted February 23, 1995) ("Michigan PSC Order") (establishes a $.05 per minute rate to call termination when the balance of LEC-to-CLEC traffic is within plus or minus 5 percent).

structure to lapse before a permanent structure has been established would leave competitive LECs in "rate limbo."

Consistent with the need for predictability, the Commission also should address the time period during which interim rates would be effective. The most pro-competitive approach would be to allow States to impose an interim reciprocal rate beginning at the time negotiations fail to produce a mutually satisfactory result. Interim rates ought to be permissible during the entire period when negotiation or arbitration is ongoing and continue until the State commission has the information it needs to impose a more permanent compensation structure. As discussed above, the Commission has the power to adopt such interim requirements.[82/]

B. The Commission Should Define the Requirements for Good Faith Negotiation as Well as Structure Negotiations to Create Appropriate Bargaining Incentives. (Notice Section II.B.1 and Section III.A.)

Specifying concrete standards for good faith negotiations is essential to preventing incumbent LECs from exploiting market power to undermine the negotiation process. As stated in the attached Statement of Dr. Brock, theoretical models demonstrate that incumbents enjoy a substantial advantage over new entrants because they have far less to lose from delays in reaching a conclusion.[83/] To help facilitate the negotiation process, the Commission should:

82/ See supra Part III(B); supra Note 72.

83/ See Exhibit 3 at 2-3.

- Prohibit LECs from insisting on the status quo unilaterally imposing model or form agreements, or seeking to impose any conditions on interconnection negotiations calculated to create delay;[84/]

- Establish "default" results (such as bill and keep for reciprocal compensation) to apply in the absence of agreement;

- Adopt a rule that presumes that any technical and financial arrangements made available by an incumbent LEC within the 24 months preceding the start of negotiations should be available to new entrants.

- Establish meaningful penalties for a party's failure to disclose relevant cost information on a timely basis,[85/] and permit the use of cost proxies in the event cost information is not produced, is not complete, or is unreliable.[86/]

84/ For example, requiring that a party requesting interconnection to defer negotiation until it receives certification from the State as a competitor should be prohibited as a bad faith, delaying tactic. Under Sections 251(b)(5) and 251(c), any "requesting telecommunications carrier" is entitled to LEC interconnection services and co-carrier compensation for transport and termination without regard to State certification. The Commission therefore should explicitly prohibit LECs from delaying interconnection negotiation pending a requesting carrier's certification by the State.

85/ The Commission could provide, for example, that a party's failure to provide cost information on a timely basis would require a State to exclude that information from consideration if it is beneficial to the party that withheld it.

86/ For example, the States that reject bill and keep might consider the 0.2 cent-per-minute average incremental cost figure established by a RAND Corporation study would serve as an acceptable cost proxy for reciprocal transport and termination, especially because two incumbent LECs, PacBell and GTE, and California PUC were members of the Incremental Cost Task Force that conducted the study. See Bridger M. Mitchell, Incremental Costs of Telephone Access and Local Use (Santa Monica, Calif.: The RAND Corporation, 1990); reprinted in William Polard, ed., Marginal Cost Techniques for Telephone Service: Symposium Proceedings, NRR1 96-1 (Columbus, Ohio: National Regulatory Research Institute, 1991), Dr. Gerald W. Brock, Incremental Cost of Local Usage, filed on behalf of Cox Enterprises, Inc., in CC Docket No. 94-54 on March 16, 1995, at 2.

VI. THE COMMISSION MUST RECOGNIZE THAT CONGRESS ADOPTED DIFFERENT STANDARDS TO GOVERN DIFFERENT TYPES OF CARRIERS. (Notice Section II.)

The 1996 Act embodies a set of distinct regulatory standards for different classes of carriers. It is evident that Congress intended, by adopting these standards, to differentiate the level of regulation applied to carriers depending on their position in the marketplace. Congress also maintained the existing distinctions between commercial mobile radio service ("CMRS") providers and landline carriers, so the Commission should continue its efforts to address CMRS interconnection in its pending proceeding on that matter.

A. Congress Distinguished the Obligations of Telecommunications Carriers, LECs and Incumbent LECs. (Notice Section II.A.)

As the Notice recognizes, Section 251 carefully distinguishes the obligations of telecommunications carriers from LECs and the obligations or all LECs from those of incumbent LECs.[87] The broadest obligations apply to all telecommunications carriers.[88] LECs have more detailed obligations, including providing reciprocal compensation and number portability and permitting resale.[89] Incumbent LECs have the most detailed obligations, including provision of unbundled elements and permitting resale at wholesale rates.[90] These distinctions are based on a reasoned Congressional determination that each

87/ Compare Notice at § II.B. (incumbent LECs), Notice at § II.C. (LECs) and Notice at § II.D. (telecommunications carriers).

88/ See 47 U.S.C. § 251(a).

89/ See 47 U.S.C. § 251(b).

90/ See 47 U.S.C. § 251(c).

type of carrier should have obligations that reflect the nature of the services its provides and the level of market power that it enjoys. Incumbent LECs, which provide basic services over ubiquitous networks and which dominate the local exchange market, logically have the most significant obligations.

These distinctions must not be blurred by imposing unbundling and other Section 251(c) requirements on non-incumbent LECs and other new entrants. If Congress believed non-incumbents should be compelled to comply with the requirements of Section 251(c), it would have said so. Instead, Congress established different requirements for different carriers, and the Commission must follow the directive of Congress in its implementation proceeding.

For this reason, the Commission should not attempt to impose unbundling requirements on non-incumbent LECs because they lack the market power that gives incumbents both the incentive and the ability to chill competition by denying access to their facilities. Similarly, the Commission should maintain the distinction between non-incumbent LECs and incumbent LECs in its resale rules because non-incumbents have little incentive to stifle resale.

B. The Commission Should Adopt Separate Rules for CMRS Providers in the Pending CMRS Interconnection Proceeding (Notice Section II.B.2.e(2).)

The Notice solicits only limited comment on the interrelationship of the interconnection negotiation process and standards under the 1996 Act and the FCC's ongoing CMRS Interconnection proceeding, recognizing that the Commission already has a record in the CMRS Interconnection proceeding on this issue.[91/] For a variety of reasons, the Commission should not "fold" CMRS interconnection into the present proceeding or hold the CMRS proceeding hostage to await the results of this proceeding.

Cox's views on the FCC's jurisdiction over incumbent LEC-CMRS interconnection are well known to the Commission.[92/] Cox is greatly concerned that the FCC will abandon the promise of PCS as a near term competitor to landline carriers and compromise the Commission's jurisdictionally distinct Section 332 authority over LEC-CMRS interconnection rates by drop kicking CMRS into the Section 251/252 State-by-State process. Not only would this harm the potential for CMRS as a facilities-based competitor; it also ignores the fact that CMRS networks operate over wide interstate regions that make a State-by-State negotiation process unwieldy and unfair.

In making this case, Cox is not advocating a distinction that Congress has not already codified. CMRS and CMRS interconnection are jurisdictionally unique. There is true cause for concern that incumbent LECs will use the 251/252 process as a means of sublimating the "local" calling issues specific to wireless services to the political processes in each State, thereby ensuring that wireless does not achieve its potential. Skepticism about the potential for CMRS as a local competitor could well become a self-fulfilling prophecy if the FCC tries

91/ Notice at ¶ 169.

92/ For years Cox has urged the FCC to formulate interconnection policies that enable PCS and other CMRS providers to challenge the LEC landline local monopoly. As a result of the 1993 Budget Act's changes to Section 2(b) and Section 332, the FCC was provided with the authority to sweep away the jurisdictional confusion and whipsawing incumbent LECs have used so successfully to prevent the establishment of reasonable interconnection rates. However, in accordance with the Notice's admonition, Cox will not repeat these arguments here.

to force fit CMRS interconnection into the 1996 Act framework, where it was not intended to be.

The Notice questions whether there are reasons to distinguish CMRS and CMRS interconnection from interconnection provided by the incumbent to other service providers using other technologies.[93/] The issue, however, is not about treating different technologies differently. Indeed, Cox is a firm believer that all competitors entering into reciprocal compensation arrangements with incumbent LECs should enjoy the same cost standard.[94/] Rather, the issue is a jurisdictional one; namely, should the FCC or the States arbitrate CMRS-LEC interconnection disputes. On this question, the Congress has spoken: it is the Commission that has been charged with the responsibility.

The Commission need not be concerned that acting on CMRS interconnection separate from the current Notice is somehow failing to deal with interrelated issues comprehensively. Even within the body of this Notice, the FCC acknowledges that it is often more prudent to deal with complex interrelated issues in separate phases or proceedings.[95/] Cox counsels a similar approach with CMRS interconnection.

Finally, the Notice requests comment on the desirability of treating CMRS providers as LECs, as permitted by the 1996 Act. Because Congress did not include CMRS within the

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93/ Id.

94/ Cox urges the Commission to adopt interim bill and keep for both wireless-to-wireline and wireline-to-wireline interconnection.

95/ The Notice correctly recognizes a connection between Section 251/252 implementation issues and interstate access charge reform. Rather than attempting to tackle both in a single proceeding, the FCC is implementing Section 251/252, while committing to address access separately. See, e.g., Notice at ¶ 165.

initial definition of LEC, and nothing has changed since February 8 to justify modification of this Congressional determination, Cox believes that there is no basis to classify CMRS as a LEC service. The appropriate time to re-evaluate whether CMRS should be considered a LEC is when and if CMRS actually becomes a meaningful substitute for traditional landline local exchange service.[96/]

VII. THE COMMISSION SHOULD ADOPT ENFORCEMENT PROCEDURES THAT PERMIT NEW ENTRANTS TO OBTAIN RELIEF IF INCUMBENT LECS FAIL TO LIVE UP TO THEIR OBLIGATIONS. (Notice Section II.G.)

A. The Commission Should Specify Enforcement Mechanisms to Govern LEC Interconnection Violations and Discriminatory and Anti-Competitive Conduct. (Notice Section II.G.)

Time is of the essence for new entrants seeking to enter the local telephone market, especially in light of the number of companies that are planning to provide competition in the local exchange. For that reason, incumbent LECs have every incentive to delay competition by undermining the rapid negotiation of a just and reasonable interconnection agreement.[97/] The establishment of national rules to require the swift redress of incumbent LEC attempts to

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96/ Indeed, the Commission already has a tool it can use to determine when CMRS providers should be treated as LECs. The tests in Section 332(c) for determining when CMRS providers may be subjected to State rate regulation also would be suited to deciding whether a CMRS provider should be treated as a LEC. See 47 U.S.C. § 332(c)(3).

97/ According to one Justice Department official.

> You've got companies that are trying to compete who have to negotiate with monopolies . . . . To the extent you can narrow those parameters, you can make that situation more tenable.

See Edmund L. Andrews, Justice Dept. Vows Scrutiny of Bell Deals, N.Y. TIMES, April 29, 1996, at D1 (quoting Justice Department official).

delay State interconnection negotiation processes is, therefore, critical to the development of just and reasonable interconnection arrangements for new entrants.[98/]

In particular, the Commission should establish two levels of enforcement to govern the negotiation of just and reasonable interconnection arrangements under Sections 251 and 252. First, the Commission should specify that States have the power to enforce Sections 251 and 252 consistent with federal rules and policy and subject to FCC review under Sections 251(d)(3) and 253.[99/] In addition, the Commission should retain parallel jurisdiction

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98/ By the same token, there is little need to provide enforcement mechanisms for new entrants. Congress's intent in the 1996 Act was to encourage investment policy by new facilities-based entrants. The legislative history of the 1996 Act provides that the interconnection provisions are designed "to create competitive communications markets." Furthermore, Section 253's provisions empowering the Commission to preempt State barriers to entry demonstrate Congress's purpose of eliminating regulatory obstacles for new entrants. Consistent with prior Commission precedent, the legislation does not evince any concern that new entrants will have the ability to price unlawfully because firms lacking market power cannot rationally price their services in ways that would contravene the reasonableness and nondiscrimination provisions of the Act. The 1996 Act authorizes the Commission to forbear from enforcing any regulation or provision with respect to a telecommunications carrier, or class of telecommunications carriers or services, upon making the appropriate statutory finding. Accordingly, the Commission should preempt any state enforcement requirements that create a barrier to entry for new entrants pursuant to Section 253 and forbear from applying any federal enforcement mechanisms to new entrants.

99/ The 1996 Act confirms that States have these powers. Section 252(e) demonstrates Congress's intent to preserve State enforcement powers with respect to interconnection negotiations. Subsection 252(e)(3) provides that, subject to the FCC-established guidelines and prohibition on entry barrier in Section 253,

> nothing . . . shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Accordingly, state commissions can enforce the provisions of Sections 251 and 252 with regard to matters properly within their purview.

to order forfeitures and other enforcement remedies for interconnection violations. Courts have consistently held that federal authorities have parallel jurisdiction with the States to engage in enforcement proceedings.[100] In addition, the exclusive federal nature of the Commission's forfeiture authority for violations of the Act is well-established.[101]

B. The Commission Should Specify Concrete Remedies to Protect New Entrants from LEC Interconnection Violations and Discriminatory and Anticompetitive Conduct. (Notice Section II.G.)

Specific remedies for LEC violations of Sections 251 and 252 are critical to give meaning to the Commission's and State enforcement powers and to protect new entrants from anticompetitive conduct by incumbent LECs.[102] Without specific remedies, it may be impossible for new entrants to obtain speedy relief in the event of a breakdown in interconnection negotiations with incumbent LECs or LEC failure to comply with the terms of negotiated or arbitrated agreements.

100/ See United States v. St. Regis Paper Co., 355 F.2d 688, 695 (2d Cir. 1966) (the FTC may "exercise control" to enforce the proscription against unfair methods of competition and deceptive acts or practices in commerce by means of cease and desist orders in conjunction with the State attorney general); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980) (the Federal Water Pollution Control Act "preserves federal enforcement authority despite State permit-issuing power").

101/ See Miami MDS Co. v. FCC, 14 F.3d. 658, 661 (D.C. Cir. 1994) (forfeiture provisions of the Act "authorize[] the collection of such forfeitures . . . in district court"); Dougan v. FCC, 21 F.3d 1488, 1491 (9th Cir. 1994) (forfeiture provisions of the Act "vest[] exclusive jurisdiction in the district courts to hear enforcement suits by the government, *and* suits by private individuals seeking to avoid enforcement").

102/ Indeed, the Commission already has been informed of incumbent LEC actions that "violate the duty to negotiate in good faith." See Notice at ¶ 47.

The Commission should maximize the number of enforcement remedies available to new entrants for incumbent LEC interconnection violations. The Commission has found, for example, that the market power of incumbent LECs requires "the full panoply of . . . traditional regulations[]."[103/] Thus, the Commission should exact forfeitures under Sections 501 et seq. of the Act for incumbent LEC interconnection violations in contravention of Sections 251 or 252 or other provisions of the Act In addition, the Commission may award damages pursuant to a Section 208 complaint for unlawful rates or practices of incumbent LECs.[104/] Finally, BOC failure to negotiate in good faith or otherwise comply with Sections 251 and 252 should be weighed heavily in proceedings under Sections 271 and should act as a bar to grant of interLATA applications until such time as the BOC can demonstrate that it complies with the letter and spirit of Sections 251 and 252 and the Commission's implementing rules.[105/]

The Commission's rules also should provide for federal and State remedies for new entrants for incumbent LEC violations as interconnection negotiation proceeds. As noted above, time is of the essence for new entrants, and delays caused by incumbent LEC bad faith should not be tolerated. A new entrant should not be required to wait until the compulsory arbitration period begins under Section 252 to complain if a LEC refuses to

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103/ See Policy and Rules Concerning Rules for Competitive Common Carrier Services, First Report and Order, 85 F.C.C. 2d 1, 23 (1980) ("Competitive Carrier I").

104/ See Las Cruces TV Cable, et al. v. FCC, 645 F.2d 1041 (D.C.Cir. 1981); see also Teleconnect Co. v. Bell Tel. Co. of Pennsylvania, 77 Rad. Reg. 2d (P&F) 409 (1995).

105/ Failure to negotiate in good faith may be deemed to constitute non-performance of a material term of the "competitive checklist" set forth in Section 271(c)(2)(B), thereby warranting rejection of a BOC's interlude authority request. See 47 U.S.C. § 271(c)(2)(B).

negotiate in good faith.[106/] For instance, if a new competitor simply wants to replicate the terms and conditions of an existing agreement. and the incumbent refuses, there should be no obligation to wait until the end of the statutory 270 day period to obtain relief for this violation of Section 252(i). The Commission should also establish that State commissions are allowed to order specific performance of the terms and conditions of Section 252 agreements, arbitrations or decisions.[107/]

VIII. THE COMMISSION SHOULD ADOPT SPECIFIC RULES IMPLEMENTING SECTION 253. (Notice Section I.B.)

Although the Notice briefly discusses Section 253, which forbids the States from erecting barriers to local telephone competition, it does not propose any implementing rules.[108/] The Commission should not ignore Section 253, but instead should provide specific guidance regarding areas in which States and local governments may and may not act. By providing parameters of acceptable State actions under Section 253, the Commission will greatly reduce the need for later, case-by-case determinations of permissible and

106/ The FCC has authority under Section 205 of the Act to prescribe just and reasonable maximum charges where it finds that existing charges would violate the Communications Act, if continued. See Expanded Interconnection With Local Telephone Company Facilities, Second Memorandum Opinion and Order on Reconsideration, CC Docket No. 91-141, 8 FCC Rcd 7341, 7348 (1993).

107/ The Commission has employed consent decrees, for example, to enforce LEC violations of the affiliate transaction rules. See New York State Dept. of Law v. FCC, 984 F.2d 1209 (D.C. Cir. 1993). It is well-settled that specific performance is available as an alternative to damages as a means of enforcing contractual duties. Restatement, 2d, Contracts, 357 et seq.

108/ Notice at ¶ 22.

impermissible regulations. Creating greater certainty at the beginning of the process is critical to new entrants.

Section 253 provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[109] While States and localities have the power to adopt certain types of regulation under other provisions of Section 253, that power is in all cases circumscribed by this broad prohibition on entry regulation.[110] The Commission has the power to determine when particular State or local requirements violate Section 253.[111]

While Commission action under Section 253(d) is on a case-by-case basis, the Commission also can define the scope of Section 253 through its general rulemaking power.[112] Adopting rules would make sense because doing so will reduce the need for case-by-case determinations and is likely to simplify adjudication of many of the complaints that will be brought to the Commission. If States and localities know that certain types of rules are outside the limits defined by the Commission, they will be much less likely to adopt rules that exceed the limits. States and localities also will have more confidence in their ability to adopt appropriate requirements for telecommunications carriers if they know that certain types of rules are permissible. At the same time, providing guidance on permissible State

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109/ 47 U.S.C. § 253(a).

110/ 47 U.S.C. § 253(b), (c).

111/ 47 U.S.C. § 253(d).

112/ SEC v. Chenery Corp., 332 U.S. 194 (1947) (regulatory agency will be given discretion to determine when to proceed by adjudication and when to proceed by rulemaking).

and local rules in this proceeding will make it easier for the Commission to respond to complaints: Many complaints will be resolved simply by reference to the rules (and many potential complaints regarding permissible actions will be avoided), which will materially assist competitors deploying their networks.

Moreover, this is not a hypothetical concern. The need for Commission guidance as to the scope of Section 253 already is becoming apparent. Some States, such as Pennsylvania, have expressed uncertainty regarding the scope of their authority, and Commission guidance will answer their questions.[113/] Other States, such as Texas, have recognized that their existing laws may be in conflict with the requirements of the 1996 Act.[114/] Consequently, it is vital for the Commission to provide guidance as to the limits of permissible State regulation under Section 253.

The most important area for Commission guidance is entry barriers. The rules should specify that States are not permitted to impose substantive requirements regarding the size of markets served or the specific customers served or any other requirement that would limit the ability of a new entrant to choose to offer economically efficient services. Otherwise, as is the case in Texas, it is possible that State regulators could impose requirements that, under the guise of defining service areas or service requirements, effectively preclude many companies from entering the marketplace. This is particularly important for cable

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113/ See Implementation of the Telecommunications Act of 1996, Tentative Decision, Pa. Pub. Util. Comm., Docket No. M-009, (Mar. 14, 1996), at 5-8 (requesting comment on the scope of the PUC's authority to require applications for certification).

114/ See Public Notice, Pleading Cycle Established for Comments on Public Utility Commission of Texas' Petition for Expedited Declaratory Ruling, DA 96-750, rel. May 15, 1996.

companies, whose service areas typically do not correspond to existing telephone service areas, even where there is substantial overlap.[115/]

The Commission should also prohibit all *local* entry regulation. The 1996 Act does not permit any locality to erect any barriers to competition. The only role for local governments is to manage local rights-of-way, and even then local governments may not discriminate among providers of telecommunications services.[116/] There is no warrant for any other local regulation under the 1996 Act, and the Commission should prohibit it.

The Commission also should specifically preempt any provisions of cable franchises, State cable laws and local cable ordinances that restrict the ability of cable operators to provide telecommunications services by codifying in its rules the statutory limitations of Section 621.[117/] As shown above, it is likely that Cox and other cable operators will be important competitors in the local telephone marketplace, so all barriers to their provision of

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115/ The Commission also should clarify that any State authority extends only to entities providing service to the public. States should not be permitted to intrude into private contractual arrangements for the lease or use of non-common carrier facilities such as fiber links or rights-of-way. There are many such facilities, owned by cable companies, electric utilities, railroads and other entities, that new competitors may wish to use to provide local telephone service. There is no justification for State efforts to regulate the providers of those facilities, because they are leasing facilities, not providing telecommunications services. Indeed, assertion of State jurisdiction over these entities is akin to assertion of State jurisdiction over a provider of fiber optic cable or a company that leases photocopiers. Nevertheless, at least one State already has attempted to assert its jurisdiction to require entities to obtain certification as carriers before they can provide facilities to new competitors. See Application of NewTelco, L.P., Draft Decision, Conn. Dept. Pub. Util. Control, Docket 95-08-36, Jan. 16, 1996. Thus, it is apparent that the Commission must adopt rules that prevent this type of State overreaching.

116/ 47 U.S.C. § 253(c).

117/ See 47 U.S.C. § 541(b)(3).

telecommunications services should be lifted. This is consistent with Congressional intent and the views of the Administration as well.[118/]

Finally, the Commission should define certain types of State regulations that are permissible under Section 253. While it is unnecessary to define an all-inclusive list, it is appropriate to specify regulations that will not ordinarily be deemed to violate Section 253. These regulations would include reasonable notice requirements that do not prevent a carrier from entering a market and consumer protection rules that apply generally to all entities doing business in a State. By providing States and carriers with this guidance, the Commission can create greater certainty and reduce the burdens of implementing Section 253 for all concerned.

IX. CONCLUSION

In these comments, Cox has described a framework for implementation of the Congressional preference for the development of facilities-based competition in the local telephone market. Under this framework, national requirements adopted by the Commission will be applied by the States in negotiations and arbitrations, with easily-applied price/cost standards for transport and termination, unbundled elements and resale. Cox's framework is

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118/ Indeed, the legislative history shows that Congress was aware of State laws that could prevent regulated utilities from entering the telecommunications business and adopted Section 253(a), in part, to respond to those laws. As the Conference Report explains, "explicit prohibitions on entry by a utility into telecommunications are preempted under this section." Conference Report at 127. The same principle applies with equal force to any prohibitions on cable operators providing telecommunications services, whether in State law, local ordinances or cable franchises.

consistent with the underlying requirements of the 1996 Act and with the strong Congressional interest in providing an environment in which competition can thrive.

By applying different costing and pricing standards to reciprocal transport and termination, unbundled elements and resale of LEC services, the Commission can create opportunities for CMRS providers, cable operators and other entities to bring new, facilities-based services to the public, while permitting other forms of competition based on unbundled elements and resale to develop as well. By adopting Cox's proposed bounds and default cost proxies for the costs of reciprocal transport and termination and the costs of unbundled elements, the Commission also can maintain the important State role in common carrier regulation while providing all parties with positive bargaining incentives in their negotiations under Section 252. By adopting other rules that encourage good-faith bargaining, including rules on the technical terms of interconnection and interim cost standards, the Commission can further reduce the need for future regulatory intervention, to the benefit of all parties.

For all of these reasons, Cox respectfully requests that the Commission adopt rules in accordance with these comments.

Respectfully submitted,

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May 16, 1996

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 16th day of May, 1996, I caused copies of the foregoing "Comments of Cox Communications, Inc." to be served via hand-delivery, to the following:

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COMPENSATION ARRANGEMENTS
UNDER THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 (the "1996 Act") imposes on incumbent local exchange carriers ("LECs") the duties (among others) to: (1) transport and terminate calls that originate on competing networks pursuant to a reciprocal compensation arrangement; (2) interconnect with and provide unbundled network elements to other carriers; and (3) provide services for resale by others. The 1996 Act also establishes three different pricing standards to be applied to these three distinct incumbent LEC duties:

(1) Section 252(d)(1) provides that the rates for interconnection of facilities and for unbundled network elements must be "based on the cost . . . of providing the interconnection or network element" and "may include a reasonable profit."

(2) Section 252(d)(2) states that the rate for mutual exchange of traffic under a reciprocal compensation arrangement must provide for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Specifically, the rate must be based on a "reasonable approximation of the additional cost of terminating such calls," and may include "bill and keep "

(3) Section 252(d)(3) requires incumbent LECs to offer services for resale at wholesale rates determined on the basis of retail rates less any avoided costs, such as marketing, billing and collection.

These three pricing standards are not cumulative. That is, a service provided by an incumbent LEC is governed under one of the three standards, not two or more of the standards. The applicable standard is based on the degree to which a competitor is using its own facilities. Section 252(d)(1), which governs interconnection and unbundled network elements, applies when a competing carrier is using incumbent LEC facilities to supplement its own facilities--for example, when the competitor provides its own switch and fiber backbone but must interconnect to the incumbent LEC in order to lease unbundled loops. Section 252(d)(2), by contrast, applies when both carriers originate calls on their network facilities and terminate calls on the other carrier's network pursuant to a reciprocal compensation arrangement that provides for the mutual exchange of traffic. In this regard, whether one or both networks are using partially leased facilities to complete their networks is irrelevant; what matters is that both networks must be capable of originating and terminating traffic to end users. Section 252(d)(3), in turn, applies when the competing carrier simply resells the incumbent LEC's local exchange service.

The language used by Congress reveals that some of these pricing standards are more flexible than others. In particular, Section 252(d)(1), under which rates are based on cost plus a reasonable profit, is the least specific of the three standards. This flexibility is critical in determining how LECs recover overhead and common costs. For example, while recovery of marketing costs in charges for unbundled elements is consistent with Section 252(d)(1), recovery of the same costs in rates charged to resellers would violate Section 252(d)(3). Similarly, although some contribution to joint and common costs could be included in the pricing of unbundled elements, its inclusion in the charges for exchanging traffic under a reciprocal compensation arrangement is flatly prohibited by Section 252(d)(2).

The interplay between the three pricing standards and their effect on the charges various types of carriers will pay and collect is best illustrated by example. The following examples and charts demonstrate how different compensation arrangements will apply to different types of carriers and traffic. It should be noted that, in addition to adhering to the statutory interpretation outlined above, a number of other assumptions about the compensation arrangements have been made. First, all agreements for mutual exchange of traffic, including existing agreements between adjacent LECs, are governed by Section 252(d)(2). Second, while rates for interstate and intrastate access differ, the mechanics of compensation are the same for both types of calls. Consequently, the chart for interexchange traffic does not distinguish between interstate and intrastate calls.[1/] Third, companies providing local service by reselling the service of another carrier do not collect termination charges for terminating local traffic or access charges for terminating interexchange traffic. Rather, the carrier whose facilities are used collects these charges. Fourth, it is necessary to impose an imputation requirement for access charges on incumbent LECs that provide interexchange service, but not on nondominant carriers that provide local and interexchange services. Imputation is necessary in situations when a carrier has the ability to reduce rates for a competitive service by recovering costs from a noncompetitive service. Until competition is firmly established in the local market, it will be necessary to require incumbent LECs to impute access charges to guard against anticompetitive pricing of long distance services.

1/ Cox takes no position at this time as to the applicability of the Section 252 pricing standards to access services purchased from LECs by IXCs. Use of the term "access charge" to refer to the payment made by an IXC for use of a LEC network is for convenience only.

Examples of Compensation Arrangements
<u>Under the Telecommunications Act of 1996</u>

<u>Local Traffic</u>

- *U S West and Cox operate competing local exchange networks in Omaha, Nebraska. A U S West customer makes a local call that originates on U S West's network and terminates on Cox's network*: U S West pays Cox a termination charge based on the additional cost, if any, of transporting and terminating the call pursuant to Section 252(d)(2).

- *TCG operates a local exchange network in New York, New York. A TCG customer makes a local call that originates on TCG's network and terminates on TCG's network*: There is no termination charge for intracompany traffic on the same local network.

- *Pacific Bell and Cox operate competing local exchange networks in San Diego, California and AT&T offers local service in San Diego using unbundled loops purchased from Pacific Bell. An AT&T local exchange customer makes a local call that originates on an unbundled loop on Pacific Bell's network and terminates on Cox's network*: AT&T pays Cox a termination charge based on the additional cost, if any, of transporting and terminating the call pursuant to Section 252(d)(2); AT&T pays Pacific Bell a charge for the unbundled loop based on the cost of the loop plus a reasonable profit pursuant to Section 252(d)(1).

- *Cox and Bell Atlantic operate competing local exchange networks in Hampton Roads, Virginia and AT&T provides local service in Hampton Roads using unbundled loops purchased from Bell Atlantic. A Cox customer makes a local call that originates on Cox's network and terminates with an AT&T local service customer*: Cox pays AT&T a termination charge based on the additional cost, if any, of transporting and terminating the call pursuant to Section 252(d)(2); AT&T pays Bell Atlantic a charge for the unbundled loop based on the cost of the loop plus a reasonable profit pursuant to Section 252(d)(1).

- *A reseller offers local exchange service in Atlanta, Georgia by reselling BellSouth's local exchange service. A customer of the reseller makes a local call that terminates on BellSouth's network*: There is no termination charge for intracompany traffic (which is the case here because the call is transported entirely over BellSouth's facilities), but the reseller must pay a wholesale rate for BellSouth's local exchange service based on the retail rate less avoided costs for the originating line pursuant to Section 252(d)(3).

Interexchange Traffic[2/]

- *MCI offers long distance service throughout Texas and Southwestern Bell operates local exchange networks throughout Texas. An MCI customer makes an interexchange call that originates on Southwestern Bell's network in Dallas and terminates on Southwestern Bell's network in Houston*: MCI pays originating and terminating access charges to Southwestern Bell.

- *Sprint offers long distance service in Seattle, Washington and San Diego, California, TCG operates a local exchange network in Seattle and Cox operates a local exchange network in San Diego. A Sprint customer makes an interexchange call that originates on TCG's network in Seattle and terminates on Cox's network in San Diego*: Sprint pays originating access charges to TCG and terminating access charges to Cox.

- *NYNEX operates local exchange networks in Boston, Massachusetts and Portland, Maine and in both markets AT&T offers long distance service over its own network and local exchange service using unbundled loops purchased from NYNEX. An AT&T customer makes an interexchange call that originates on an unbundled loop leased by AT&T and terminates with a NYNEX customer on NYNEX's network in Boston and terminates on NYNEX's network in Portland*: AT&T pays terminating access charges to NYNEX and pays NYNEX a charge for the unbundled loop based on the cost of the loop plus a reasonable profit pursuant to Section 252(d)(1).

- *U S West operates local exchange networks in Minneapolis, Minnesota and Fargo, North Dakota and operates interexchange facilities between the two markets. A U S West customer makes an interexchange call that originates on U S West's network in Minneapolis and terminates on U S West's network in Fargo*: U S West imputes access charges in its long distance rates

- *Cox operates local exchange networks in San Diego, California and Phoenix, Arizona and interexchange facilities between the two markets. A Cox customer makes an interexchange call that originates on Cox's network in San Diego and terminates on Cox's network in Phoenix*: No imputation is required for intracompany calls carried solely on the facilities of a nondominant carrier.

2/ Cox takes no position at this time as to the applicability of the Section 252 pricing standards to access services purchased from LECs by IXCs. Use of the term "access charge" to refer to the payment made by an IXC for use of a LEC network is for convenience only.

COMPENSATION ARRANGEMENTS FOR LOCAL EXCHANGE TRAFFIC

Terminating Carrier

Originating Carrier

	Incumbent Local Exchange Carrier serving urban portion of the exchange area (e.g., Bell Atlantic)	**Incumbent Local Exchange Carrier serving rural portion of the exchange area (e.g., GTE)**	**Competitive Local Exchange Carrier providing local service over its own facilities in the exchange area (e.g., Cox)**	**Competitive Local Exchange Carrier providing local service using its own switch and Bell Atlantic's unbundled loops (e.g. AT&T)**	**Competitive Local Exchange Carrier providing local service by reselling Bell Atlantic's local service (Reseller)**
Incumbent Local Exchange Carrier serving urban portion of the exchange area (e.g., Bell Atlantic)	No termination charge for intracompany traffic	Bell Atlantic pays GTE additional cost, if any, for transport and termination	Bell Atlantic pays Cox additional cost, if any, for transport and termination	Bell Atlantic pays AT&T additional cost, if any, for transport and termination and AT&T pays Bell Atlantic cost plus profit for one unbundled loop	No termination charge for intracompany traffic but Reseller pays Bell Atlantic wholesale local rates for the terminating line
Incumbent Local Exchange Carrier serving rural portion of the exchange area (e.g., GTE)	GTE pays Bell Atlantic additional cost, if any, for transport and termination	No termination charge for intracompany traffic	GTE pays Cox additional cost, if any, for transport and termination	GTE pays AT&T additional cost, if any, for transport and termination and AT&T pays Bell Atlantic cost plus profit for one unbundled loop	GTE pays Bell Atlantic additional cost, if any, for transport and termination and Reseller pays Bell Atlantic wholesale local rates for the terminating line
Competitive Local Exchange Carrier providing local service over its own facilities in Bell Atlantic territory (e.g., Cox)	Cox pays Bell Atlantic additional cost, if any, for transport and termination	Cox pays GTE additional cost, if any, for transport and termination	No termination charge for intracompany traffic	Cox pays AT&T additional cost, if any, for transport and termination and AT&T pays Bell Atlantic cost plus profit for one unbundled loop	Cox pays Bell Atlantic additional cost, if any, for transport and termination and Reseller pays Bell Atlantic wholesale local rates for the terminating line
Competitive Local Exchange Carrier providing local service using its own switch and Bell Atlantic's unbundled loops (e.g., AT&T)	AT&T pays Bell Atlantic cost plus profit for one unbundled loop to originate and additional cost, if any, for transport and termination	AT&T pays Bell Atlantic cost plus profit for one unbundled loop to originate and it pays GTE additional cost, if any, for transport and termination	AT&T pays Bell Atlantic cost plus profit for one unbundled loop to originate and it pays Cox additional cost, if any, for transport and termination	No termination charge for intracompany traffic but AT&T pays Bell Atlantic cost plus profit for two unbundled loops	AT&T pays Bell Atlantic cost plus profit for one unbundled loop to originate and additional cost, if any, for transport and termination; Reseller pays Bell Atlantic wholesale local rates for the terminating line
Competitive Local Exchange Carrier providing local service by reselling Bell Atlantic's local service (Reseller)	No termination charge for intracompany traffic but Reseller pays Bell Atlantic wholesale rates for the originating line	Reseller pays Bell Atlantic wholesale local rates for the originating line and Bell Atlantic pays GTE additional cost, if any, for transport and termination	Reseller pays Bell Atlantic wholesale local rates for the originating line and Bell Atlantic pays Cox additional cost, if any, for transport and termination	Reseller pays Bell Atlantic wholesale local rates for the originating line, Bell Atlantic pays AT&T additional cost, if any, for transport and termination and AT&T pays Bell Atlantic cost plus profit for one unbundled loop	No termination charge for intracompany traffic but Reseller pays Bell Atlantic wholesale local rates for the originating and terminating lines